UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:	)	Case No. 01-1139 (JKF)
	)	Chapter 11
W.R. GRACE, et al.,	)	
	)	Bankruptcy Courtroom No. 2
	)	824 Market Street
Debtors.	)	Wilmington, Delaware 19801
	)	
	)	
	)	September 23, 2002
	)	10:12 A.M.

TRANSCRIPT OF OMNIBUS HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

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*Continued to October 28, 2002, 10 A.M.
**Continued to November 25, 2002, 10 A.M.

THE COURT: This is the matter of W.R. Grace, Bankruptcy Number 01-1139. There is an agenda set for this afternoon. Will anyone who speaks when you speak please enter your appearances. Good morning.

MS. BAER: Good morning, Your Honor. Janet Baer on behalf of W.R. Grace.

Your Honor, I believe the first 45 items on the agenda have to do with fee applications.

THE COURT: Yes.

MS. BAER: I have spoken with Mr. Smith. He is not on the phone but will be -- is available on the telephone if you'd like to speak with him or have him participate. He did not feel it was necessary.

What he would like to do is have a little time on these first three interim periods. He is issuing reports now. The reports are being responded to by counsel. The thought was that a hearing be set for later, perhaps near or if not at the November omnibus hearing. Your Honor, in that respect, obviously all counsel are concerned they'd like to get the remaining 20 percent of fees not paid by the end of the year. We've been waiting for almost a year and a half for some of the fees. So, I would say the first opportunity we could get to hear those perhaps in November so that -- the idea being mind that there could be an order entered by the end of year

payments paid.

THE COURT: Well, I'm a little confused. Because I had a hearing on all these fees, I issued orders on all but one. I asked for some additional information. I suggested to Mr. Smith, and he had a legitimate concern for some additional information, I told the parties how to get it to them, and that's the last I've heard. I thought by now, you folks would have been paid what you were due on the fee orders for the last month. So --

MS. BAER: Your Honor, I apologize then. I thought Mr. Smith had contacted you and you knew a little more. Let me back up a moment. First of all, Your Honor, the hearings that you held and the order that we're going to seek entry on was just on the fourth interim application.

THE COURT: Yes.

MS. BAER: Mr. Smith did not review and issue any reports on the first, second and third interim applications. Those are the applications where his reports are just coming out now, we're just responding now and he has gotten no conclusions on those. Those are the interim applications we want continued for hearing.

On the fourth interim application, you had asked Mr. Smith to put together a spreadsheet. Mr. Smith immediately worked with the debtor, categories were agreed upon by all parties. All parties, all counsel that I'm aware of have

submitted information. And Mr. Smith, on Friday, I believe, did, in fact, issue the spreadsheet and I was told he was going to be contacting your chambers and faxing you a copy of the spreadsheet. I do have one copy with me.

THE COURT: Well, I was in the office on Friday and I didn't get any such copy of a spreadsheet.

MS. BAER: Your Honor, I can give you the one hard copy I do have, and I'm happy to do so if that would be helpful to you right now.

THE COURT: Well, I'm not going to review it now anyway.

MS. BAER: Right.

THE COURT: Is it actually filed? I can pull it up on the CMECS system?

MS. BAER: Yes.

THE COURT: Okay.

MS. BAER: Yes, Your Honor.

THE COURT: As what? What's it called or what docket entry --

MS. BAER: Your Honor, we believe it was filed under a certificate of counsel from Mr. Smith.

THE COURT: All right. It addresses all of the fee apps that I heard?

MS. BAER: It addresses all of the fourth interim period fee applications from every single counsel that was

appointed.

THE COURT: All right.

MS. BAER: In addition to that, Your Honor, Mr. Smith circulated on Friday an order awarding the fees pursuant to your previous hearings and the agreements with Mr. Smith. The parties have until noon today to actually comment on that order. I have the order with me, but I know Mr. Smith gave them until noon so they could comment on the attachment to make sure the numbers were right. So, providing noon goes by and whatever adjustments have to be made, by the end of the day Mr. Smith or my office can submit the order for signature, and that's on the fourth application. That will take care of that one. And hopefully at that point, Your Honor will be satisfied with the spreadsheet and we could lift the moratorium and keep going.

THE COURT: All right. So, that's going to be submitted under a certificate of counsel, as well.

MS. BAER: Yes, Your Honor.

THE COURT: And it's an omnibus order so I can -- okay. Is there any way to get people to stop sending me individual orders on these interim fees? I'm not signing them. I keep getting them. I get them by fax. I get them by mail. I get them by e-mail. I get them from the clerk and I'm not signing any of them.

So, if it would make life a lot easier for everybody

if we dealt with an omnibus order through Mr. Smith rather than doing these fourth interim -- or whatever the number of interim orders is because I'm not going to enter them that way. I made that mistake with Mr. Bena (phonetic), he was kind enough to send me an order to correct it, which, by the way, I signed today. So, that order was vacated, but it hopefully will be reentered either today or tomorrow in the omnibus amount.

MS. BAER: Right. Your Honor, we can certainly communicate again with all the parties. Mr. Smith has done a lot of to that in the last month to get the information put into the right format. We thought it was pretty clear, but we can certainly communicate to everyone again that omnibus orders will be submitted, not individual orders.

THE COURT: Yes, okay. That would -- that'd be helpful. Okay. As soon as I get a chance to look at his spreadsheet and see the certifications of counsel that has the order attached, then I hope to address -- isn't that Items 1 through 45 on this agenda?

MS. BAER: No, Your Honor.

THE COURT: Okay.

MS. BAER: Items 1 through 45 on this agenda are the first --

THE COURT: First --

MS. BAER: -- second and third --

THE COURT: Okay.

MS. BAER: -- fee applications, which you have not addressed at all.

THE COURT: All right.

MS. BAER: And on those, the idea would be that we have them set for November. By that time, Mr. Smith should be done and should have final conclusions.

THE COURT: All right. Are you just going to put them on your calendar then for that time or do you need some order from me?

MS. BAER: No, Your Honor. With your permission, I think we can just put them on the calendar for the omnibus in November, which is November 25th.

THE COURT: Okay. That's fine. Now, I thought I went over in pretty excruciating detail the types of things that I had problems with in the last one, am I going to have to do it again?

MS. BAER: We certainly hope not, Your Honor. I believe that from looking at Mr. Smith's report on my own law firm's fees, most of that sort of, okay, we understand that's the case. There's not a lot of you didn't -- you know, you lumped time and you didn't do this. It's more into some substantive things. But we are preparing very long responses again with the hope that we can resolve most everything and you won't have to deal with too much at the hearing.

THE COURT: Okay. For my -- my preference would be

as follows. To the extent that Mr. Smith has sent a comment, you've worked it out and you've got a revised number, you simply tell me in the agenda somehow that you've worked it out, here's the number that you folks have agreed upon. If I need to see a revised fee app, then file it. If I don't, they're already of record. So, I don't need anything additional.

If there's a contest, then list it under the contested matters. But I would like to get to the point where if you folks don't file some fee objection, I will review the fee applications and I may, on my own determine that something's inappropriate. But at least for anticipated orders, you could at least get an omnibus order circulated that would have the numbers in it that you folks could agree to. If I have some challenge with it, I'll let you know. So, please put them on the agenda. But I don't need all the details that you're putting here unless that's easier for your staff. What I really need to know is, you know, Number 44 is contested by so and so, look at this pleading. You know, and Numbers 1 through 43 aren't contested and Number 45 we have agreed on a different number, and here is what it is. That's the kind of information I need.

Now, if in order to do that you have to go through what you're going through now, that's okay. But if it can eliminate some work for you, then you can do it in a more abbreviated fashion for the fee apps.

MS. BAER: Thank you, Your Honor. We'll work it out that way.

THE COURT: Okay. All right. Yes, 1 through 45 then will be put on the November agenda.

MS. BAER: And, Your Honor, should the debtor assume that the moratorium on paying fees exists until you review the spreadsheet and --

THE COURT: And sign the other order, yes.

MS. BAER: -- sign the other order, yes. Okay.

THE COURT: I want to make sure that everybody has sent Mr. Smith the information he's looking for. And your understanding is that everyone has?

MS. BAER: That's my understanding, Your Honor.

THE COURT: Okay. As soon as I get that order, if it's in today, undoubtedly I'll deal with it either tonight or tomorrow, depending on how soon I get out of court today and when I actually see it. So, if you get it filed today, you could let me know that it's in, call the visiting judges' chambers, just leave a message for me so I can pull it up, copy it and try to get it dealt with today or, as I said, tomorrow if I don't have time to do it today, but before I leave Delaware tomorrow.

MS. BAER: Thank you, Your Honor. We'll do that.

THE COURT: All right. So, these -- 1 through 45 are continued to November the 25th at ten.

MS. BAER: Your Honor, that takes us to Item Number 46. On this one, Your Honor, we had hoped to have a stipulation. We are having trouble getting the other side to agree on what we thought they agreed on. We will either have a stipulation at the next hearing or we will have filed a motion to dismiss for failure to state a claim. One way or the other, we will bring it to a head by the next hearing. So, I would ask that that one be continued to the October omnibus hearing.

THE COURT: Okay. That's October 28 at ten. All right.

MS. BAER: Your Honor, that brings us to Item Number 47, you've already entered the order on that.

THE COURT: Yes, I did.

MS. BAER: And then the first contested matter, Your Honor, is Item Number 48, which is a motion to lift stay filed by Timothy Kane.

THE COURT: All right.

MS. BAER: Your Honor, it's full briefed and I believe Mr. Kane's counsel is here.

THE COURT: Yes, good morning.

MR. COHEN: Your Honor, with your permission, my name is Stuart Cohen. I represent the creditor, Timothy Kane, whose motion is before the Court now. I practice down in South Florida. Your Honor entered an order admitting me pro hac vice. I'm here, along with local counsel, Jason Cornell.

THE COURT: Yes, sir. Good morning.

MR. COHEN: With your permission, Judge, I'd like to address the Court with my argument.

THE COURT: Yes, sir.

MR. COHEN: Has the Court had the opportunity to review the motion?

THE COURT: Yes.

MR. COHEN: And has the Court also had the opportunity to review the --

THE COURT: I've read it all.

MR. COHEN: Okay. Terrific. I'll skip most of the preliminaries, Judge, other than to point out to you this is obviously not a toxic tort situation or a toxic tort allegation. The case does involve allegations of the defectiveness of one of Grace's products that is a roofing underlayment. And the allegation arise out the slip resistant coating that's on that underlayment. The allegations are not that it is of a toxic nature, but that it becomes extremely slippery when it's wet.

The Court will remember back almost a year ago, you permitted us limited leave to take the depositions of five Grace employees up at Cambridge where their headquarters were located. We have taken those five depositions and we're back before the Court on a motion to lift stay for Court based on what we learned during those depositions.

There are essentially two changes that have happened between the time of that hearing, Judge, and now. Number one, we were entitled to conduct preliminary discovery before a suggestion of bankruptcy was filed in the local action. During that discovery, we learned of the existence of a policy of liability insurance providing the debtor with $10 million in liability coverage which would be applicable to Mr. Kane's claim.

Now, that $10 million is a per claim limit. It is actually $15 million in the aggregate. That means that the $10 million would apply only to Mr. Kane's claim. And much to the dismay of his plaintiff's attorney, I will represent to the Court that although Mr. Kane is a paraplegic as a result of this fall, I would be surprised if a jury hearing the damages in this case would render a verdict that's one-tenth of the amount of liability coverage as opposed to a verdict that might exceed the liability coverage.

THE COURT: Why are you not filing a proof of claim here?

MR. COHEN: We did, Judge.

THE COURT: Okay. Then why do I have a motion for relief from stay? If there is a proof of claim, there will be an objection to it, if there is one. If there isn't, it will be allowed.

MR. COHEN: There hasn't been to date, Judge, number

one.

THE COURT: I see.

MR. COHEN: And, number two, we have a current case pending down in Orlando, which is Orange County Circuit Court, with four other defendants. We want to proceed in that action directly against Grace.

Number one, there's no coverage defense that's been alleged here.

Number two, there's no self-insured retention or deductible under the policy for Grace.

Number three, under the terms of the insurance policy, the defense costs are being borne by the insurance carrier, as opposed to Grace.

This bankruptcy proceeding cannot, in any way, be affected by the outcome of the Kane litigation in Florida because, based upon the stipulations that were made in our motion and the existence of this liability insurance coverage, which is not property of the estate based on the authorities we cited to the Court, that case is going to take place and has absolutely no affect on this bankruptcy proceeding.

THE COURT: How many other possible claimants are there who could --

MR. COHEN: Zero.

THE COURT: None.

MR. COHEN: None. We conducted our preliminary

discovery and it was revealed to us by Grace's own discovery responses that ours is the only pending claim alleging these allegations of negligence. There had been two former claims brought by roofers, they were resolved years ago, and there are no other pending claims arising out of this alleged allegation of defectiveness.

I'm sure Your Honor is familiar with the floodgates or the opening of floodgates argument that was made by the debtor in this case. That is absolutely not the case, it cannot be made here. If it did, then obviously the debtors' original discovery response telling us we were the only pending claim arguing these allegations of defectiveness would be incorrect.

Furthermore, we've got a policy of liability insurance that is a per claim occurrence policy. That means there's $10 million available to Grace just to satisfy Mr. Kane's claim alone. Clearly, there's no way we can get to the assets of the debtors' estate.

Most importantly to this motion, Judge, is the fact that although the debtors indicate in their motion that they've got a litigation claim that's going to go into effect to deal with the personal injury allegations or defectiveness of product allegations that are made against Grace, obviously the vast majority of which are asbestos claims, based upon their June briefing where they're indicating what the litigation plan

is, there's absolutely no procedure in place to deal with a claim of the nature of Timothy Kane's.

What we'd have happen here, Judge, if you did not grant the motion to lift the stay, we have to have a regular jury trial, I believe, here in District Court in Delaware to determine whether or not there's a defective product.

Mr. Kane's claim cannot possibly fall within the litigation plan that's been laid out by the debtors because this is not an asbestos claim. There's no claim being made here that he's got mezo epithelioma (phonetic). There's no claim being made here that he can satisfy any of the allegations that he would have to under the Toxic Tort Litigation Plan. And because of that, the judicial economies clearly weigh in favor of allowing Mr. Kane to proceed with his State Court action.

I can address the factors in terms of substantial prejudice to the parties if the Court would permit me to continue.

THE COURT: You can continue, I mean I'm aware of the factors, but, yes, you can continue if you'd like.

MR. COHEN: I'd rather wait and respond to the defendant's argument, Judge.

THE COURT: All right.

MS. BAER: Your Honor, while Mr. Kane has the only current pending claim for this particular product, Mr. Kane is

by no means unique to this case or a unique situation.

Your Honor, when Grace filed Chapter 11, there were many, many products liability cases pending. I can't tell you how many, I know I have a large litigation book of all the other litigation non-asbestos litigation that is stayed because of this bankruptcy case.

Your Honor, the matter involving Mr. Kane is covered by insurance. However, as indicated, this is a $10 million per occurrence policy with a $15 million aggregate. We anticipate there will be many products liability claims that will be filed that would tap into that insurance, not just Mr. Kane.

Your Honor, the litigation plan here is clear. We have a bar date. The bar date is March 31st, 2003. Once we know the total universe of the non-asbestos claims that are to be filed by that bar date, we will be able to put into place a litigation plan for non-asbestos claims. The June briefing did not address it because the June briefing was before Judge Wolin. The June briefing only was put together for asbestos personal injury claims.

Your Honor, has spent a great deal of time working on, I guess what you'd call, the litigation plan for the rest of the case. You've put a bar date into place, a notice program has gone out, the bar date is March 31st. We're working on the Z.A.I. situation and we have a litigation plan for that.

We're only at the beginning in terms of the litigation plan for non-asbestos claims, but we have not forgotten them. They are very significant and there are a lot of them out there. This situation, Your Honor, is not different from the Smulker (phonetic) situation that you addressed several months ago. That was a products' liability case in California for Silica Gel. This is a products liability with related personal injury in Florida having to do with a roofing product.

We don't know at this point how many other cases, how many other claims may be filed by the bar date for this product. For this one case to go forward, Your Honor, would be much like the race to the courthouse that happens and causes bankruptcy cases to be filed each day.

Yes, the Grace case was filed because of the asbestos claims. The overwhelming number. But, Your Honor, there are many, many non-asbestos claims, non-asbestos lawsuits that are pending that tap into insurance other than insurance that might cover asbestos.

THE COURT: All right. The per occurrence that we're talking about is not related to the project on which Mr. Kane was working when he fell. It is product liability coverage for the debtor for all of the debtors' projects on a per occurrence with a 15 million aggregate.

MS. BAER: That's my understanding, Your Honor.

THE COURT: Okay.

MS. BAER: Under these circumstances, Your Honor, while we sympathize with Mr. Kane, he has filed a proof of claim. We do not, at this point, have objection deadlines. That certainly will be part of the litigation plan going forward after the bar date.

Mr. Kane's products' liabilities and personal injury claim, just like many, many others like the Smulkers, like Mrs. Kellogg's claim. These claims will be dealt with in a non-litigation plan. For Mr. Kane to go forward would be to give him the preference that bankruptcy stops. It stops all litigation so the debtor has the opportunity to deal with it all at one time in a mass sense, determine what its assets are and then come up with some plan to equitably try these cases, equitably determine these claims and equitably pay the claims if they're appropriate. Theirs is no different than many of the others, Your Honor. The stay needs to remain in place. We will object to the claim in the appropriate way and will proceed in the appropriate way once the litigation plan is put into place.

THE COURT: Okay.

MR. COHEN: Judge, my understanding as to the nature of that insurance coverage is exactly the opposite as the creditors are indicating here. I haven't seen the policy of insurance and the policy of insurance has not been provided or

filed as an exhibit to the defendants' response or opposition to the creditors motion here. We don't know what that policy of insurance says.

What we do know is there isn't anyone else who's making a plan of the defectiveness of this particular product towards Grace.

THE COURT: Yes, but the fact is this. You know, the case law as to whether or insurance proceeds are property of the estate is all over the board. And unfortunately for mass tort cases, most of those decisions are dealt with in cases that are not mass tort cases and look pretty much like two-person plaintiff versus defendant type of lawsuits. That's not the case in the mass tort context.

And where there are multiple products that could be insured by the same product liability policy is also not the case in that context. I can't see any way that the insurance proceeds are not property of the debtors' estate to be dealt with in a fashion that a plan would permit because all creditors who have claims against those proceeds have the right to tap into them, and that's exactly what the bankruptcy stops, the race to the courthouse.

The only way to figure out who, rather than a race to the courthouse, is entitled to those proceeds is to bring them into the estate, have the debtor put forth a plan and pay them out to the people who are entitled to share in those proceeds.

I can't see any way in a case such as a mass tort case that proceeds are not property of the estate.

And in a product liability case, where the policy insures more than one product and has an aggregate limit as to all claimants who may make claims against those proceeds, I think that theory is the same. What you need, I guess, is to see the policy.

MR. COHEN: That's correct, Judge.

THE COURT: And I will direct the debtor to show you the policy because to the extent that the policy only covers, which I think unlikely, but to the extent it only covers this particular roofing product, then maybe Mr. Kane has some entitlement to go forward because if there have been no other claims filed, at least not by the claim's bar date in March, then maybe Mr. Kane at that point in time is entitled to go forward.

I think it unlikely that this insurance policy covers only one product, but it does. There are odd things that happen from time-to-time. I'll direct the debtors to provide you with a copy of the policy. I will defer ruling on this issue until after the claims bar date on March 31st so I can see at that point whether there are any other claims made that may involve this specific product and whether this policy encompasses only this product.

Because if both of those things come to fruition,

i.e. there are no other such claims made and the policy covers only this product, you may be entitled to relief from stay. I think it highly unlikely that both of those things are going to come to pass, but as I said, maybe they will.

MR. COHEN: Judge, would you not also require the debtor to produce a list of those claimants it believes would be takers under that particular policy so we can --

THE COURT: A list of what?

MR. COHEN: A list of those other claimants against those insurance proceeds so we can --

THE COURT: You can check the claims docket, just like the debtors can.

MR. COHEN: But there's no way that we could determine whether or not this particular policy would provide coverage for those particular losses unless we know the actual nature of the dispute being alleged as opposed to simply the creditor's name.

THE COURT: You can check the claims docket, the same way the debtor can. There will be a claims register, there's a claims agent who's getting copies of the claims. If you want copies of them, you're entitled to them, ask for them. I'm not going to make the debtor disclose every claimant filed between now and March 31st on the claim's bar date. But if you want to see them, you're entitled to them, just contact the claims agent and make arrangements to get them.

MR. COHEN: Lastly, Judge. In terms of the discovery that's going to take place --

THE COURT: There is no discovery. There is one thing I'm going to order, a copy of the policy. The debtor is going to provide this policy that allegedly has a $10 million limit for this occurrence and a $15 aggregate. I'm not permitting discovery, I've already given you that.

MR. COHEN: And the Kane action is otherwise stayed as to all the parties, as opposed to just simply the debtor?

THE COURT: Oh, no, I -- no, it's stayed as to anybody other than the debtor.

MR. COHEN: The --

THE COURT: I haven't been asked to do that.

MR. COHEN: And I apologize, Judge, I realize that's not framed within the pleadings that I've put before you, but there are four other defendants in the Kane litigation down in Florida and an argument was made based upon your original order that you entered that the stay applicable to the debtor also applied to these other parties. And when we got before the State Court Judge, he almost made me come back here for clarification before Your Honor, and I didn't want to wait until March 31st to get the clarification.

THE COURT: But what I said, however, is to the extent that the debtors' product is at issue, I am not going to permit any finding by another court to determine that this is a

defective product.

Now, if the State Court judge refuses to interpret that as saying he can't go forward because the whole issue is bound up and whether the debtor has a defective product, then I would think he's not going to go to trial. But as to the defendants in the case, it's not stayed. It is as to the debtors' product.

MR. COHEN: I appreciate that.

THE COURT: Does that help?

MR. COHEN: It does. I appreciate the clarification, Your Honor. Thank you.

THE COURT: All right. Let me give you a date. The bar date is March 31st. The debtor is going to need a little time, I'm sure, to go through this with the claims agent to see whether there are other claims with respect to this product. How about if I continue this until my May hearing? That should be sufficient time for the debtors and your client, as well, if you want to go through that claims register to see if there are any other claims made against these products and also to examine the insurance policy.

We haven't picked dates for next year, that's one of the housekeeping things I was going to do later. I will be here May 19th and May 20th. Do you know whether you have a Board meeting the 19th? If not, I would expect to schedule this on the 19th.

MS. BAER: Your Honor, what day of the week?

THE COURT: Monday.

MS. BAER: Monday the 19th will be fine.

THE COURT: All right. With respect to Agenda Item Number 48, the debtor is to produce to Mr. Kane's counsel a copy of the insurance policy discussed on the record today. How long would that take for you to get the policy to him?

MS. BAER: By the end of the week, Your Honor.

THE COURT: All right. Within ten days. The motion for relief from stay is continued to May the 19th.

We also haven't discussed the time. Here we go. In my wild dreams, we're hoping that we may be able to do the following, so let's discuss this. What's the possibility that we could start Owens at 8:30 in the morning? I'm not sure where all of you are coming from, but when we start at ten, are you coming in -- Grace. I'm sorry. Oh, no, this is -- I apologize, I'm looking at my wrong list. I was hoping we could start Grace at noon on Monday, to the extent that you don't have a Board meeting those days. Would that be a problem?

MS. BAER: I think that's fine, Your Honor.

THE COURT: Noon, all right. So, this will be May 19th at noon. And the debtor will simply put this back on the agenda at that time and we'll see what happens.

MR. COHEN: I appreciate it. Thank you, Your Honor.

THE COURT: All right, thank you. The stay remains

in effect until that time as to the debtor and the debtors' product.

MS. BAER: Your Honor, would you like the debtor to prepare a written order to that respect?

THE COURT: I would, please.

MS. BAER: Your Honor, the next item on your agenda is Item Number 49, which is the motion of Carol Gerard. This is directed toward Maryland Casualty and the request for the posting of the bond.

THE COURT: Good morning.

MR. KORTANEK: Good morning, Your Honor. Steve Kortanek with Klehr Harrison. We are one of the law firms representing the Libby Mine claimants who have made this motion, Your Honor.

Your Honor, the motion to require Maryland Casualty to post a bond raises some very significant issues. And --

THE COURT: Why wasn't it raised when the other matters -- I mean Ms. Gerard's here more regularly than the debtor is in this court anymore. Why hasn't this motion been raised on a timely basis when the initial pleadings were filed?

MR. KORTANEK: Your Honor, frankly, it was something that occurred to us during that process, but we didn't think to pursue it until later. But we still think that given the amount of time that this injunction will likely be in place, that it's very important for Your Honor to try to at least

consider the relief we have requested.

THE COURT: Well, Maryland isn't even a movant, is it?

MR. KORTANEK: Your Honor, we think they're the functional equivalent of a movant. If you take two hypotheticals, Your Honor, take one where we cited a case called Carabeta (phonetic) and there is both a debtor movant and a non-debtor movant in that case.

Say, for example, that the nondebtor movant took little or no meaningful role in the act of persuading the Court to enter that injunction. Yet Rule 65 or Bankruptcy Rule 7065 would automatically allow Your Honor to require a bond from that party.

If you take another situation which we think almost happened here where the sole moving party is the debtor and, in reality, Maryland Casualty devoted significant resources -- actually wrote more pages and briefs and spent a lot of time arguing before Your Honor trying to protect its own assets, that that's a different situation and one where the permissive nature of Bankruptcy Rule 7065 is very important to consider. It says that Your Honor may enter an injunction without conditioning the injunction on a bond because, of course, the regular Rule 65(c) requirement is absolutely black letter law. The Court has almost no discretion.

Obviously it makes sense in the bankruptcy context to

excuse the debtor and the estate from the affects of a bond. A bond is designed fundamentally to give the parties like the Libby claimants some redress if, however, unlikely the Court or the parties consider it, the injunction is later determined to have been improvident.

What's crystal clear here is that the primary purpose of Maryland Casualty's efforts in connection with this injunction were to protect its own corporate assets. And if we're proven right at some point, again, however unlikely, if there is no bond, it's also black letter law, we will have no redress. We will have the passage of significant amount of time with no remedy.

THE COURT: You've already had passage of time without a remedy because the case wasn't -- the cases basically haven't been pursued until after the debtors filed bankruptcy. So, first of all, their post petition actions -- maybe I'm forgetting one that was pre-petition, but offhand, I can only recall post petition actions having been filed. It seems to be a theory that's newly created, maybe because the debtor filed bankruptcy. I've already stated on the record, I can't see much chance that this lawsuit is going to result in a verdict in favor of your client and against Maryland Casualty because at least as to the documents that were submitted, and I will go back and double-check through them. Again, I thought there were sets here, there are not. So, I'll have to get them in

Pittsburgh, and I apologize for that, it was my misunderstanding.

I could find no document that placed an independent duty on Maryland Casualty to do anything. Maryland Casualty was acting as an insurer. It was monitoring the debtors' functions, it was making some suggestions about how to control asbestos related issues. It did nothing on its own, either as an interloper, a contractor person, a donor, nothing that would somehow indicate that there was an independent responsibility on Maryland Casualty to do anything that would impose direct liability.

Now, I've already said, maybe I don't have the universe of documents, I'm not making fact findings. All I'm doing is looking at the question of the likelihood of success on the merits, which is something that I need to do in addressing, A, the concept of the injunction and, B, the necessity for a bond. On both of those matters, I think that Mrs. Gerard will lose.

Now, I don't know how having made those findings I'm now in a position of saying that Maryland Casualty, when I don't think its own assets were implicated to start with, should post a bond to protect Mrs. Gerard against a verdict I don't think she's likely to get.

Now, admittedly, I'm not making fact finding. And at a trial, this could all turn out to be different, that's -- it

just could. And based on the evidence, it may. I don't have any way of assessing that except to look at the information the parties have submitted so far. Based on the information the parties have submitted so far, I don't see the likelihood of success on the merits. And as a result, I don't see how I could exercise my discretion to have Maryland, who isn't a party here, post the bond when I don't think it's likely to lose anyway.

Now --

MR. KORTANEK: Well, Your Honor, that's -- that's really the main point. If you look at Your Honor's threshold decision that -- whether to apply your discretion to impose a bond, what we think is that that then puts you in the realm of Rule 65(c) in the sense that if there's any chance -- unless someone sitting here is 100 percent sure that we'll take nothing as far as Maryland Casualty's direct assets, and we all know there's been no trial, we're estopped from doing anything in the action and we're talking many years in the future before that eventuality can come to pass.

Unless someone is 100 percent sure, then the proposition that folds back into what the 3rd Circuit teaches about the purpose of Rule 65(c) and the purpose of a bond is that if somehow it goes to the size of the bond, which, you know, Your Honor then would then be considering, and the purpose is to prevent that manifest injustice of having that

determination made, without so much of a likelihood of success judgment today, but the reality of if that situation comes to pass we will have nothing. This does not have any impact upon the estate because it's requiring Maryland Casualty who, our view is, trying to protect its own assets. And here, you have to take us at our word, we respectfully submit, because that's our claim. We're making our claim against their direct assets and we've said in our pleadings, these claims are not claims against any insurance proceeds. So, that by definition, the injunction is protecting their direct assets.

So, we hear Your Honor, we've heard you before. Your view on our likelihood of success on that claim. But we're talking about many years, in all likelihood, before we can go forward. And if that determination is made, we'll have nothing, no protection and they're the free rider here. And we think that's unjust.

THE COURT: Well, is there some reason to believe at this point in time that Maryland Casualty is either insolvent or approaching insolvency. Because if there is, there's probably a different issue that I need to be addressing. And if there isn't, then you should have the likelihood of recovery if your client is successful in obtaining a judgment against Maryland Casualty.

MR. KORTANEK: Oh, yeah, we don't -- we don't contest their solvency, Your Honor. We're talking about the time value

of money primarily, that's the way our papers are flushed out. And there's a significant amount of claims here. The parties try to downplay them, but reality is certain of these claims in a very analogous sense have gone to trial. And so there has been jury determinations of the types of harm these people have suffered and --

THE COURT: Against Maryland Casualty?

MR. KORTANEK: No, no, these are claims against Grace that demonstrate once you get passed the liability issue what the damages are.

THE COURT: Oh, heavens, it's not a damage issue as to the -- the reason this case is here is because there's so many damages against Grace. But that hasn't have anything to do with Maryland Casualty's direct obligation. As far as I know, there hasn't been a suit tried against Maryland Casualty, has there?

MR. KORTANEK: Well, no. But, of course --

THE COURT: Okay. No.

MR. KORTANEK: -- we've just discovered the documents that --

THE COURT: Well, let's stop. The answer is no. So, there is no history upon which I can base any evidence of what some likelihood of recovery may be because there has been no past history of recovery. So, even in that sense, it seems to me that the request for a bond is not appropriately addressed

in a positive way by me on this record.

MR. KORTANEK: Well, we think it does show damages that have been established by juries for --

THE COURT: Against Grace, sure.

MR. KORTANEK: Right.

THE COURT: Yes.

MR. KORTANEK: But once --

THE COURT: No doubt about the fact that Grace is significantly -- it has significant liability for matters related to incidents in Libby, Montana. No doubt about that.

MR. KORTANEK: All right. So, primarily --

THE COURT: But there's significant doubt about whether Maryland Casualty has an independent obligation.

MR. KORTANEK: That's correct, Your Honor. And primarily we're talking about the liability issue and we think we have given you some track record as far as the types of damages these people have suffered. If there's a liability determination, we think that's where it's going to come out.

THE COURT: Well, I don't know because there is a liability determination against the debtor because it's the debtors' mine, the debtors' employee, the debtors' product, the debtors' direction. I haven't heard anything that says that it's Maryland Casualty. Nothing. And I did look at the documents.

Mr. Kortanek, I believe that I am going to deny this

motion for the reasons that I've expressed on the record.

However, since I did think that I would have the chance to review the documents, again, here in Delaware today and they're not here, I have to go back to Pittsburgh and review. I'm going to go back and take a look because this issue of the direct liability I think is a factor that I want to consider. So, I'm simply going to ask the debtor to put this back on the November 28th -- I'm sorry, October 28th calendar and I will give you a ruling at that time, if not before, so that I have a chance to go back and take a look at the documents that have been submitted.

I simply want to make sure I didn't miss something in taking a look at those documents first.

MR. KORTANEK: Okay. Thank you, Your Honor.

THE COURT: So, I will continue this. Does the debtor want to address anything now?

MS. BAER: Your Honor, I only want to remind you that we have to go back and look at why this injunction was put into place. Even if they did have a potential cause of action against Maryland. That really is not the issue here.

This injunction was entered at the debtors' request. Maryland was not a party. Counsel for Gerard was notified. They could have participated. They did not object to the entry of the injunction. When this matter came back before your Court when counsel for Gerard moved to modify or clarify the

injunction, they didn't even notice Maryland. This was an injunction put into place by the debtor on behalf of the debtor for the debtor to protect its assets and to protect these asbestos claims so they're dealt with in one place.

Maryland just happens to be, if you will, a, quote, "beneficiary" to a certain extent of the injunction. But this is for the debtor, by the debtor, because of the debtor. And it is a completely inappropriate situation in which to order Maryland to post a bond.

THE COURT: Well, I'm not sure that the discretion function will let me adopt the principle that Maryland is the functional equivalent of a moving party. They have, of course, filed papers with respect to the bond in this case. So, I'll consider that aspect of it, as well.

But I am, at the moment, more concerned about the fact that I really don't see a likelihood of success on the merits and I want to make sure that I didn't miss something in reviewing the papers that had been submitted on that score. So, I just ask, please, that you put this back on the October 28th agenda and if I can do an order in the meantime, I will. If not, I'll announce my findings then and have the debtor submit an order that will memorialize those findings afterwards.

MS. BAER: Thank you, Your Honor. We'll do so.

THE COURT: All right.

MS. BAER: Your Honor, the next item on your agenda is a new one that was added on an emergency basis. Late last week, I believe late Wednesday evening, the debtor was served with a motion to expedite hearing, accompanied with a motion and memorandum to compel relative to the Z.A.I. science trial discovery. A tremendous number of papers were filed with that motion and I think that the movants pretty clearly made their viewpoints known to the Court and educated the Court quite a bit. In fact, enough apparently to accelerate the hearing to today on the motion to compel.

THE COURT: No, actually I signed the hearing notice that put the hearing on for today before I got any of those papers. It seems to me that on the expedited time frame that I scheduled that if we're going to do discovery disputes, they should be done on a prompt basis. That's why it's on for today.

MS. BAER: Thank you, Your Honor. Your Honor, if I could, Jim Restivo from Reed Smith is here today. That is special litigation counsel for the debtor in the Z.A.I. science trial. I believe to put this into context, given you have received a lot now from the movants and very little from the debtor, it would be appropriate to hear Mr. Restivo recite for you the history of where things are at in terms of the Z.A.I. discovery.

THE COURT: All right, that's fine. Mr. Restivo?

MR. RESTIVO: Good morning, Your Honor.

THE COURT: Good morning.

MS. SCARUZZI: Identify yourself.

MR. RESTIVO: My name is James Restivo, I represent the debtor.

Your Honor, the papers filed late last week contain some inferences that suggest that perhaps this is a race to the science trial with respect to discovery and that Grace has been in the race for a while and that plaintiffs are just starting. There's also some inferences that we're involved in some gamesmanship here of hiding the ball. And so I do think in dealing with the motion to compel, the Court should be made aware of the context.

Thirteen years ago today, Your Honor, Mr. Westbrook and I were in a courtroom in the Court of Common Pleas of Allegheny County trying what was known as the Mount Lebanon High School case involving asbestos containing Grace fireproofing. We tried that case for five weeks.

It's true that at that time, I looked a lot younger and Mr. Westbrook looked exactly the same. But the point is that case was filed in 1983. It was subject to six years of discovery by Mr. Westbrook's firm, including visits to the Grace repository at Winthrop Square (phonetic).

In 1992 and 1993, Your Honor, Reed Smith tried a six-month trial involving all of the State-owned buildings in West

Virginia. That case involved ten years of discovery, including repeated visits to the Grace repository at Winthrop Square. I mention that because after a jury verdict in favor of Grace, an Appellate decision requiring a new trial, Mr. Westbrook and his firm were called upon to handle the new trial and, therefore, received all of the discovery that took place.

And in 1999, Your Honor, Mr. Westbrook and I tried for two months in New York City an asbestos property damage case which had been discovered for ten years, including repeated visits to the Grace repository.

With respect to attic fill, Your Honor, in the year prior to the Grace bankruptcy, year, year and a half, a number of putative class actions were filed on behalf of Z.A.I. Attic claimants. One was Barbanti, which was a putative class action, went for an injunction hearing between Mr. Westbrook's firm and my own. That was subject to discovery on Z.A.I. documents prior to the hearing.

In addition, all of the Federal class actions were placed by the MDL before Judge Patti Saris in Massachusetts. That was subject to discovery on Z.A.I..

Mr. Sobol, of the Lieff Cabraser firm, on behalf of the various plaintiffs' firms that you've seen here, Your Honor, sent eight people to the Grace repository. They tagged and copied 52,000 pages of material allegedly relating to Z.A.I.. When Mr. Westbrook's people showed up two weeks ago,

they asked for a recopying of that material and we are doing that for them.

And so, independent of the discovery for the science trial, thousands and thousands of documents have already been produced over the last 15 years. And Mr. Westbrook's firm has been in the repository 14 separate occasions over the last 15 years. And so this is not, and the Court ought to understand this is not a race that's just beginning.

With respect to the documents, Your Honor, one, a position might be that nobody needs any historic documents. That the issue is what does science tell us about whether Z.A.I. in an attic is hazardous. It either is or it isn't. There will be scientific testimony. The various scientists will testify and so one could make an argument that something that happened 25 years ago, 30 years ago really doesn't answer the scientific question. It may answer a liability question, possible a damage question. But it doesn't answer the science question.

Nonetheless, the Court ought to understand what we have done and what we are providing. And if I may give the Court a summary sheet, I think it will put it in context.

THE COURT: Have you seen this, Mr. Westbrook?

MR. WESTBROOK: No, Your Honor. But I don't mind him handing it up, I'll look at it.

THE COURT: All right. Thank you.

MR. RESTIVO: May I approach the bench?

THE COURT: Yes. Thank you.

MR. RESTIVO: Your Honor, the Winthrop Square document repository really grew out of property damage litigation involving fireproofing material, acoustical plaster. Some of which contained asbestos commercially added, some versions of which did not contain asbestos, but still contained vermiculite.

That repository has itself organized in terms of copies of original documents in boxes and boxes and boxes. Over the years, a number of plaintiff firms, including Mr. Westbrook's firm, have had some complaints. They're raised again in these papers, we don't think they're justifiable, that it is difficult to find the relevant needle in a haystack of documents.

And so prior to bankruptcy when there was EPA litigation, EPA investigations and the various class actions and approximately, Your Honor, 8,000 boxes of documents that had never been reviewed and never put in a repository because they didn't deal with fireproofing and they didn't deal with acoustical plaster or plastic, those documents needed review.

A decision was made, and Reed Smith was part of the decision, to go through the boxes of documents to tag and to burn on disk the relevant documents so that we would not face a criticism that we were producing original documents and someone

had to go through 8,000 boxes. And so another aspect of their motion -- on the one hand they say it's hard to work through the repository because there's boxes and boxes of hard copy documents. Another part of their motion says with respect to this new group of documents, they want to give us information on a computer disk rather than sending us to the 8,000 boxes of documents.

In any event, what we have done, Your Honor, is we have categorized those documents consistent with the subject matter on subject sheet I have provided to Your Honor. And, again, this was done not only for Z.A.I. civil litigation, but also because the client was obligated to provide documents for administrative EPA investigations.

And so if the plaintiffs here want documents dealing with testing of attic insulation, we were going to produce for them documents on a disk which would be number 30 or number 30-02 so they didn't have to look through 8,000 boxes of documents as originally kept. And so, we believe, with respect to the documents not in the repository, an awful lot of work has been done. In their papers, they talk about the fees that were charged for doing it. And it is true the work has been done. The work has been done to counter criticisms about the repository. And so we think this is easier for everybody and because we elected to do it this way. We didn't remove the relevant needle in a box of documents from that box. We didn't

segregate it. We burned it on to a disk so people could have it.

And, therefore, to try to go back and now tag it and make sure in that box there are no other documents which would be inappropriate to produce, it is really an effort that shouldn't be done, doesn't need to be done and would slow down this process. We clearly are in a position to produce to them the relevant documents in a simple way that avoids all the criticisms they've made over the years about the document repository.

THE COURT: Haven't I been asked on several occasions to order the debtor to produce the documents on disk if you had them that way?

MR. RESTIVO: Your Honor, I don't -- I can't answer that because I haven't been here on all of the hearings. But in any event, the disk approach was decided by us before this bankruptcy. And so the fact that they are on disk may be consistent with what the Court has said, but it wasn't done because the Court said that we did it pre-bankruptcy.

And so, Your Honor, in terms of production and format, we think that their aspects of the motion just simply don't make any sense. We are giving them the 52,000 pages identified by Mr. Sobol, to the extent they don't have it. They wanted to see 387 boxes of ledgers which we did not burn on the disk, either because of the size that we couldn't or

more likely we didn't think there was any relevance. They said they want to see them, we're going to let them go look at the 387 boxes of ledgers.

So, on format, we think that the approach we've adopted is absolutely correct and in good faith and will move things along.

Another issue, Your Honor, is relevance and scope and there is a disagreement among the parties. As they spell out in their papers, vermiculite ore is dug out of the ground in Libby, Montana. It is mined and then it is milled and then it is processed. And then ore concentrate after a lot of procedures is shipped to various expanding plants. It is then further processed and, at some point, it becomes an end product.

One of those end products is Z.A.I. attic insulation. If one uses the phraseology vermiculite, and then seeks documents, one is covering everything from the mining of the ore to the finished product. And we have said in our objections to discovery what happened at the mine and the ore and the -- all of that and what happened at the plants and the disposal of waste, none of that relates to the science trial on what does science tell us concerning whether Z.A.I. in an attic is hazardous. And so it is true that we have objected to some of the requests on the grounds of relevance and overbreadth because it hasn't been limited to the finished product.

Everyone agrees, Your Honor, at least in the Barbanti preliminary injunction hearing, their experts and our experts, this material, the finished product, contains by weight one one-hundred to one one-thousandth of one percent of asbestos, if it's in there at all. And so to dig out documents and produce documents relating to what happened when you mine the material clearly is beyond the scope of what this Court is trying to determine what does science tell us about the Z.A.I. in the attic.

And, therefore, we have not attempted to give environmental documents, Libby disease documents, mining documents, et cetera.

We do agree and have agreed with Mr. Westbrook in his comment at the August 26th hearing, he does need testing related to Z.A.I. We've agreed to give him testing related to Z.A.I. and there are a lot of documents related to that. And he's going to get them.

They've been in our repository now for two weeks, Mr. Turkewitz plus three individuals, although Mr. Turkewitz left after a couple of days and the individuals are there. We pointed them to 61 boxes of what traditionally and historically has been called notice documents in the non-Z.A.I. litigation. Obviously a significant issue for liability purposes has been what did the corporation know and when did it know it. Those documents or anything remotely affecting that issue have been

put, years ago, in boxes and have carried the rubric notice documents.

Clearly some of the documents in there would have very little relevance, if any. But in an attempt to, in the prior litigation, segregate out what people may be looking for, that's what was done. And so it is true when Mr. Turkewitz, for the 15th time in 15 years, visits -- not Mr. Turkewitz, but his firm, visits the repository, he is told in terms of what you may be interested in, the relevant material is probably in these documents. We're not saying these are all relevant, we're not saying there's anything in there. But certainly in terms of the prior litigation, as you know, to the extent the plaintiffs wanted to know what did Grace know about asbestos, when did it know it, that's where it is.

And so it's true you have to look through material. They weren't -- those documents have never been categorized under our system. They have been in that repository for years and years, but we're trying to be helpful, rather than have them look through every piece of paper in the repository.

Lastly, Your Honor, there is an argument or a suggestion or an inference or a claim, it's not clear to me, that what the plaintiffs would really like to have is to the extent Reed Smith has had attorneys look at documents and make some decisions and conclusions and mental impressions on what the document says, how it can be used, whether it's helpful or

non-helpful, yeah, I think it would be very helpful for them to have that Reed Smith work product, okay. It would be what we think about the documents. Obviously they're not entitled to that.

Under Rule 26(B)(3), even if they could show good cause for other types of work product, the Court clearly has to protect against disclosure of our mental impressions, conclusions and opinions. And so if we give them the documents that are relevant organized on a disk with a particular subject matter, they can reach their own conclusions.

I would note, Your Honor, that many of the documents we have on the disk or have that can be placed on the disk will be of little relevance to them. The EPA was interested on what went on at expanding plants. And so for the EPA, if they wanted to know what went on at the Rio Piedras, Puerto Rico Expanding Plant, there was a code entry for that. If they ask for documents of that type, we would say that's irrelevant unless something in there relates to testing.

And so there are a lot of categories on here which they will see eliminates a whole bunch of documents they will never have to look at.

And so, Your Honor, with respect to their proposed order, they say any existing computer indices for the Boston repository and for Grace's collection of vermiculite documents. The subjects, and we would organize the documents, we don't

have a problem with that. To the extent that term suggests, Reed Smith's internal listing and work product as to what we think about the documents, some of which is clearly on a computer, that they aren't entitled to.

They want you to order us to produce an organized set of what they call vermiculite documents. And, again, what we can produce that's not in the repository is an organized set of documents. We object to the term vermiculite if it goes all the way back to the stuff in the ground. And so we can give them that, but we object to the language in their order because it's too broad.

Third, they want originals of all documents requested. And we think based upon the background we've given to send us back to 8,000 boxes to identify the documents we now have on disk by subject matter so that they can see the hard copy would absolutely be a waste of time and an expense --

THE COURT: Well, have the hard copies been redacted? What's on the disk, are they original documents with no redactions?

MR. RESTIVO: Original documents, no redactions.

THE COURT: And are they all the documents? You've been talking about relevant documents.

MR. RESTIVO: Relevant documents, Your Honor. So, for example, I'm told a banker's box will hold about 2,000 pieces of paper. And I'm going to make this up, assume that we

have a box from the Rio Piedras, Puerto Rico Expanding Plant. Assume further that one document in that box is someone from the plant took the finished product Z.A.I. if they made it. And they took it and they installed it in an attic, they did some testing on it. That's in that box along with, I'm making it up, Your Honor, time sheets, reconstruction of a road on the plant. What we have done is that one document, we have burned that onto a disk, or we have the ability to burn that onto a disk. It went back in the box. We did not copy or burn on the disk the other 1,999 pages because they weren't relevant to anything.

And so it's true the original one page exists in the box, but we didn't Xerox the whole box. Didn't copy, burn the whole box because you don't need it.

We could go back. We could send a team of people back on through looking for that one document and we could put a little tab on it or we could take it out of the box so they don't see all the other stuff, but I don't think it's necessary. Obviously, and Mr. Westbrook knows this, if on the disk there is some particular document that looks funny, okay, looks like maybe it was changed, altered, rewritten, then we'd have to go back and check it and we would do that, notwithstanding this motion.

But by and large, you don't need to go back and dig out the originals because a picture of the original is on the

disk.

THE COURT: Okay. Then I guess the question is about the determination of which documents are relevant. It seems to me that taking a look at the information that's on the disk ought to be a good starting point. If after that, you think there's something missing, maybe go back to the original documents. But if there have been no redactions to the documents that were copied, obviously it's somebody's judgment call as to what's relevant at the outset, maybe somebody else would disagree and find something more. But I'm not sure with all these documents produced whether that will be necessary if this batch of documents is reviewed first.

MR. RESTIVO: We believe, Your Honor, that this batch of documents amounts to 500,000 images, which I understand an image is a page for the non-computer literate. And so there really is an awful lot of stuff there that can be reviewed and if a review of that material indicates there's some gap somewhere, which I can't believe it will, then we could, you know, revisit the issue. But that's an awful lot of material. I mean we -- anything that would remotely relate, you know, to attic insulation is in there. At some point, it won't surprise me if Ed doesn't say to me there's a lot of stuff in there that's just not terribly relevant. Well, there is, but we were over inclusive, not under inclusive. And after someone goes through that, plus the 387 ledgers, if they want to look at

that, plus the material already reviewed and copied by Lieff Cabraser. After all that, if it looks like there's some gap somewhere or they need more, then I think that would be fair. But right now, I think there is more than enough to keep all of us busy.

THE COURT: All right. With respect to the scope, the scope of the discovery at the moment is limited only to what the science trial is going to produce. It's not for damages, it's not for liability. I've been trying to make that clear from the outset.

So, to the extent that there are documents that shows some medical history of disease in Libby, Montana that's simply a result of the vermiculite mining operation, I don't consider that to be relevant. I don't see how at this stage of the trial that's going to advance anything.

What we need to do is get the information to your expert that they're going to want in order to determine whether Z.A.I. poses some unreasonable risk of harm and that's what I'm trying to get to.

So, to the extent that it's a finished product, request the debtors to produce it because to the extent that there is something dealing with Z.A.I., it is to be produced. But until the stuff becomes Z.A.I., it's irrelevant for a science trial, it doesn't matter what it was before. What matters is what Z.A.I. and what's in the attics and how is it

used and what risk of harm does it pose, if any.

MR. RESTIVO: Thank you, Your Honor.

THE COURT: Mr. Westbrook, that's a lot of stuff the debtor wants to give you.

MR. WESTBROOK: That's what I'm worried about, Your Honor, because sometimes the best stuff is not in the first wave, so to speak.

Your Honor, let me back-up just a second. And I know Mr. Restivo knew that we were trying a case 13 years ago before I told him before the hearing started this morning, he remembered that independently. But anyway, Your Honor -- and I just was handed Mr. Restivo's document entitled W.R. Grace Fall, 2001 document review. And that indicates, at least as I read it, that in November, 2001, Grace had these documents on disk. Four days after you appointed me as special counsel, I served a set of document requests and asked for documents. Thirty days later, they responded and they said a lot of objections.

A week or two after that, we had a discussion. They said, well, we have some CDs. They had said on August 26th, they'll be coming on a rolling basis. On September 11th, they said, we'll start to get them in three or four weeks. Well, I'm now 60 days after I served my document request and we're still hearing about the CDs, the CDs which existed in November, 2001. I don't have the first CD.

Now, it is true we have been to Winthrop Square on a number of occasions. And as Mr. Restivo said, the reasons for visiting Winthrop Square on the vast majority of times was to -- were to look for the Monocoat (phonetic) document, the Nelmix (phonetic) documents.

The reason you don't find an awful lot of vermiculite documents there is because Grace didn't put the vermiculite documents in Winthrop Square. They deemed them irrelevant at the time of the Monocoat litigation. That's the reason that Mr. Restivo and his firm have been out looking at eight-five hundred other boxes, I believe, to pull out the vermiculite documents.

So, the argument that we have been to Winthrop Square and are slogging through Winthrop Square is just not an answer as to where the vermiculite documents is.

What I want to focus on first, Your Honor, is our request for a computer indices. At our hearing on July 22nd, I raised the issue that Grace was far ahead and it spent a million dollars or so and perhaps they computerized their documents, and the Court indicated, well, don't worry about that, you don't need more money because you're going to get the benefit of that computer index. And that was my impression going forward, at least.

Our document request, I think, Number 7, I asked for any computer indices. They refused to produce any saying

they're work produce and protected.

THE COURT: Well, they can't have it both ways. Mr. Restivo, are you going to produce the computer indices or are you going to go back to the original documents? It's a simple matter. We're not going to have fights about discovery, gentlemen, we're just not going to do it. This is the one and only chance, so let's get it resolved right now.

MR. RESTIVO: Your Honor, I think it depends upon what Mr. Westbrook means by computer indices. The document I provided to Mr. Westbrook just today, and to the Court, is an index of the subject matters and codes by which we have organized the documents. If that's what he means by a computer indices, yes, he has that.

If what he means is my work produce on my computer that tells me what my people thought about a particular document, that, no, we would not produce that. He can look at the document and draw his own conclusions. But it is on a computer. And so our objection --

THE COURT: This is my definition of an index. It's like a menu, folks. Whatever it is that the debtor has, not the debtors' attorneys that the debtors' attorneys created for litigation purposes, but if the debtors' attorneys created it for the use of the debtor in organizing documents and it's an index of what's in the box, it's to be produced.

If the debtors' attorneys have it on their computers

and you're concerned about the fashion in which it's organized, then refashion it to take out your own mental impressions so that it is nothing more than an index. It goes from A to Z or January 1 or, you know, 1000BC to the present, I don't care what fashion it's organized in. But whatever index there is of the information that's in these documents, it's to be produced.

MR. RESTIVO: We can do that, Your Honor.

THE COURT: How long from now?

MR. RESTIVO: Twenty-one days, Your Honor.

THE COURT: You'll get your index within 21 days. If you don't, I'll impose sanctions. File a motion.

MR. WESTBROOK: Yes, Your Honor. Your Honor, having heard what I have heard this morning about the original situation, and I talked to Mr. Bentz on Friday afternoon when they filed their opposition, we're willing to defer our request to look at the originals. It looks like it's an overwhelming task, we just couldn't get to it in the context of what we're trying to do. So, if we can get a meaningful computer index so we can get into these documents and start to organize them by witnesses and by dates, et cetera, we're going to -- we're certainly going to take a stab at that.

THE COURT: I don't know whether it will be meaningful or not. Sometimes indexes are meaningful and sometimes they don't do much. Regardless of that fact, you're going to get an index.

With respect to the original documents, before you go through what the debtor has already agreed to produce on the disks and the other documents that you've seen, I really don't see the need to go into those originals. If you need a particular document that didn't scan properly or something, that's a different issue. But to go back through all those originals and have the debtor recreate it, I just don't see the need for that right now.

So, that request, you can defer it until later, if you'd like, or I'll simply deny it without prejudice. I think you're going to have enough to go through at the outset.

MR. WESTBROOK: It sounds like once we start to get these, we will have a lot to go through, Your Honor.

With respect to the scope, Your Honor, and I want to be clear so we understand what we're all talking about here. If we are going to be permitted at the outset as the first cut to get the expanded vermiculite documents, I think we can get started on those. But I tried to make the point in our memo to the Court that Z.A.I. is simply a commercial name that Grace gave to expand the vermiculate that it poured into a Zonolite attic insulation bag, the same expanded vermiculite was poured into a masonry fill bag.

THE COURT: Maybe. But it doesn't -- but the product that we're trying is attic insulation, not masonry products. We're trying Z.A.I. attic insulation, as I understood it.

MR. WESTBROOK: Yes, Your Honor. But my point is that the same expanded vermiculite, if there were tests done on fiber release during pouring of the expanded vermiculite. The fact that it was poured into a different bag, it's the same product.

We're looking for the expanded vermiculite information. Some of it may be relevant, some of it may not be relevant. But we think we need to get that so that we can do our work. For instance, we provided the Court with a document which shows that the exact same size of vermiculite was used for two or three Grace commercial products. So, we certainly don't want the cut to be, well, we have a document that shows when you disturb masonry fill insulation, you get this fiber level. It's the same product that was in an attic insulation bag, but we're not going to produce that because we called that masonry fill. We think that would be a far too narrow scope of discovery, Your Honor.

THE COURT: We're not trying whether or not masonry fill, when used in a construction product, poses an unreasonable risk of harm. We're trying whether attic insulation used primarily in homes, although not exclusively, posses an unreasonable risk of harm. Whether the release content absent that Z.A.I. or the other product is produced and used is the same or not, I don't know, I don't care. I'm not trying the masonry side, I'm only trying the attic insulation

side. So, to the extent that somebody is going to buy a product that's called masonry something and uses it for attic fill, they have a different problem than one that we can address at the science trial here.

MR. WESTBROOK: Let me go at it this way, Your Honor, perhaps. Science does not care whether Grace called it Z.A.I. or expanded vermiculate and you get fiber release, and you get fiber levels that have been measured and reported in Grace documents, for instance, we believe that's relevant and may lead to admissible evidence as to the level of fibers you can get when you expand -- when you disturb, for instance, Libby Number 2 expanded vermiculite, which was attic fill. Simply because you call it a Ford and he calls it a Chevy, if it's the same car, the evidence is relevant, in our view, and we think we're entitled to have the expanded vermiculite information, not going back to Libby now. I understand what the Court has said about that. We're talking about when you get through the expansion process and we have the expanded product. That's what we're seeking.

THE COURT: I don't know how we'd ever identify homes in which some person or any kind of building in which somebody bought something in a bag called masonry fill and used it for attic insulation and expect to have some comparability of evidence. This is not about trying to notify at some point people who may have used masonry fill of some unreasonable risk

of harm. It's about trying to decide whether there is such a harm in preparation for looking at some notification to these folks that have the insulation that they may have a claim against this estate. That's what this is preparatory towards.

So, I don't see how it's relevant whether stuff in a masonry fill bag has the same asbestos weight or release potential or not. Because even if it does, it isn't the product that's at issue.

MR. WESTBROOK: And I think, Your Honor, that's where we may have a difference of opinion because the product -- and I'm talking -- for instance, let's say Grace, in its laboratory, tested Libby Number 2 vermiculite by putting it on a surface, disturbing it and getting fiber release. That, in our view, is attic fill. That is the product attic fill. Whether Grace calls it Libby Number 2 or product X or whatever they called it, we think we're entitled to that information.

THE COURT: No, wait, Mr. Westbrook, this whole thing started because the Asbestos or Property Damage Committee had pictures that they wanted to go into the notice process of what Zonolite bags looked like. I wasn't asked to address anything about masonry fill bags or any other attic insulation produced by Grace, only Zonolite, that's it. And there were pictures of the bags, and there were pictures of the product and there were pictures of what the product would look like if it had been in the attic for a while and covered with dust, that's all I was

asked for.

Now, how is it that I'm going to now somehow or another open up this whole scope to other products? This is a very limited and narrow scope trial. It's to address whether Zonolite, because the class actions that I've been asked to certify relate to Zonolite insulation. So, what's the relevance to anything else?

I mean your experts are going to have Zonolite. They'll test it. They're decide whether, in their view, it does or doesn't pose some unreasonable risk of harm and they'll tell me about it.

MR. WESTBROOK: I think that's right, Your Honor. Of course, these other products are Zonolite. My point is that part --

THE COURT: Well, no, are they Zonolite?

MR. WESTBROOK: Yes, Your Honor.

THE COURT: Well, then why aren't they sold as Zonolite?

MR. WESTBROOK: They were. Zonolite was the name of the company Grace took over in the early '60's and they put the name Zonolite on all these products.

THE COURT: Okay. If they're Zonolite products used for attic insulation, then you're entitled to discovery.

MR. WESTBROOK: If they were expanded vermiculite, which is the same product that went into attic insulation,

that's what I'm trying to get at.

THE COURT: It's not the product it goes into. It is the finished product that's in question. It doesn't matter what that vermiculite -- what danger level the vermiculite has in its nature state or in some work in process state. It matters about the finish product, doesn't it? That's what I'm trying.

MR. WESTBROOK: And I'm talking about the finished product as the expanded vermiculite, Your Honor. And sometimes they took the finished product and they poured it into an attic insulation bag. They took the same product and they called it something else. But I'm saying the danger of that product and testing they did back in the laboratory on that same product is information we should have in discovery. You may not admit it in the trial, but I think we should have it in discovery so we can do our investigation and do the job that you have asked me to do.

THE COURT: Okay. How is it -- because I'm still missing the link. If it's calculated to lead to discoverable and admissible -- to admissible evidence, then you're entitled to get it. But how is it likely to lead to admissible evidence? Because if the tests were done on something that's put into an attic insulation bag, you're going to get those tests.

If the product isn't put into an attic insulation

bag, I'm not hearing it. Because all I'm doing is a trial about attic insulation.

MR. WESTBROOK: I guess what I'm talking about, Your Honor, is testing, say, done in the Grace laboratory. And let's use Libby Number 2.

THE COURT: Okay.

MR. WESTBROOK: The standard vermiculite because that is -- when into a lot of attic insulation. If that testing is done by Grace simply to determine can expanded vermiculite Libby 2 release fibers on disturbance, hasn't gotten in any bag yet, they're working on the expanded vermiculite in the lab, we think we're entitled to have that.

THE COURT: That may be relevant to a liability issue as to what the debtor knew and when. But how is relevant to whether once that product is bagged and purchased by somebody and put into an attic, it constitutes an unreasonable risk of harm?

MR. WESTBROOK: For instance, Your Honor, I would say for instance that if Grace sampled the product, put it on a surface in the lab and disturbed it and they got fiber release, then they take the same product and put it into a bag and then the product is sold, that there is a potential inference that you'll get the same type of fiber release when you disturb the same product that was on the floor here, put into a bag and put on someone else's floor.

THE COURT: Well, let me -- without making a finding, just accept that conclusion for purposes of the next statement. It doesn't matter at that point in time what the level of disturbance was anyway. What matters, I think, is whether there are claims against this estate now and what happened in the intervening 80 years or 60 years since this stuff has been used in people's home and to date, maybe one person who lives in Libby has recovered a judgment and nobody else has.

I mean I'm still having some difficulty seeing how that's going to advance at this trial. I'll hear from the other side, maybe there is something I'm missing. I understand the request for similarity and test on similarity of product, it may be relevant, I may let you get it, but I want to hear from the others.

MR. WESTBROOK: Okay, Your Honor. And I understand the CDs are coming. Could we have some idea, Your Honor, as to when these documents will come? I understand the index may take a few weeks to get going, but we had some indefiniteness about when these CDs are going to arrive. So, we can get geared up and we'll have to --

THE COURT: All right.

MR. WESTBROOK: -- obviously talk to someone on their side about how you access them and what programs they're using, et cetera.

THE COURT: Yeah.

MR. WESTBROOK: I don't know if they're prepared to do that now or whether we'll just have to --

THE COURT: Mr. Restivo, on the CD? Oh, are you finished?

MR. RESTIVO: Are you finished?

MR. WESTBROOK: No, I have a few --

THE COURT: All right.

MR. WESTBROOK: Related item, Your Honor, is the privileged log. We've asked for a privileged log, Grace says it has no problem providing that. We'd like to know when we're going to get that because the Court will not be surprised that sometimes we find some interesting documents on a privilege log. I think Grace, over the history of the litigation, has had to either, under Court compulsion or after a re-review de-privileged about eight boxes of documents in Winthrop. So, we think there may be some in there we'd like to look at.

THE COURT: You're entitled to it.

MR. WESTBROOK: So, a privilege log -- Your Honor, we have also asked for Grace to give us information on the personal injury claims relating to expanded vermiculite now, not back at the mind, but expanded vermiculite and the claims that it has resolved. Grace has refused to produce those. We think that if we get those -- information on those claims, it may lead us to the plaintiff's attorneys and to the claims and we can find out have these been claims involved in homes, have

they been claims of disease, what types of disease. What product was it.

THE COURT: That's not what we're trying. We are trying a very simple thing. At some point in time, if there is a determination that there is an unreasonable risk of harm, they're undoubtedly entitled to that. But right now, I've made the offer for anybody who wants to join in this trial, either as a member of the Committee portion of the trial or independently who wants to make a claim. Nobody else has come forward, that's expanding well beyond what you need right now.

MR. WESTBROOK: Your Honor, we had thought that one of the things we would need to at least look into to address the issue of whether there can be a potential hazard from Zonolite is whether it has caused more disease in expanded form.

THE COURT: How are you going to determine that from the claims register that the debtor has that hasn't involved Zonolite?

MR. WESTBROOK: No, we just ask only for expanded vermiculite personal injury claims, Your Honor, not the claims register. We asked -- and they can separate out that claims have been made against them, I understand, for expanded vermiculite.

THE COURT: All right.

MR. WESTBROOK: Next, Your Honor, we have asked for

settle dust testing, re-entrainment testing on asbestos fiber measurements. Now, maybe this is coming in the new document review, so we may not have a particular problem with those if they show up.

THE COURT: Do you want to defer that one until you see what you get?

MR. WESTBROOK: Your Honor, I think that would probably be best to do that.

One other item, Your Honor, we have asked for is the documents produced by Grace. You've heard about Maryland Casualty in a different context. Grace and Maryland Casualty had some coverage litigation for property damage and we have asked them for their documents produced to Maryland Casualty, including the pleadings, that relate to Z.A.I., and they've refused to produce that information.

THE COURT: Aren't they on a public record?

MR. WESTBROOK: No, they sealed the record, Your Honor.

THE COURT: Well, then how are we going to get it if the record's sealed?

MR. WESTBROOK: Well, Your Honor, I think -- that Grace can certainly make an application to the Court that sealed the record we're in the Bankruptcy Court here, I think that there can be some process by which those documents are not locked away forever. They were sealed presumably because Grace

didn't want to bring additional litigation or claimants on itself. It's now in the protection of the Bankruptcy Court, it will take care of everything in this situation. I don't think there's a compelling reason to continue to seal that.

In addition, we'd be willing to take the documents under seal to see what Grace was saying about Z.A.I. to its insurer when it was trying to get coverage for the claims. We think that could be very relevant.

THE COURT: All right.

MR. WESTBROOK: Your Honor, I believe that covers the issues for right now pending my friend Mr. Restivo --

THE COURT: All right.

MR. WESTBROOK: -- having his comments.

MR. RESTIVO: I will try to take them quickly in order, Your Honor. With respect to the CDs, what Mr. Bentz told Mr. Westbrook is true. We will be in a position to provide CDs. I did not mean to suggest, and I don't think we ever suggested to Mr. Westbrook that in this process, the CDs were actually cut. If I did suggest that, I didn't mean that. The whole process was designed to be able to do that. I don't know if we told Mr. Westbrook -- originally, pre-bankruptcy, a company called Lason was the organization that was doing this. Lason's bankruptcy preceded Grace's bankrupt by about two months, three months. Post bankruptcy, we went to a new service provider.

And so in order to get what we looked at back in Lason plus now, yes, they need to be burned onto CDs. We did not burn a CD as we saw a document. We're going to do it. And we told Mr. Westbrook we would be able to begin providing CDs in --

MR. BENTZ: Two weeks.

MR. RESTIVO: -- two weeks. We don't have -- we don't have -- it's not as if we all have CDs in our office because of Lason's bankruptcy, we didn't have it. And I thought he understood that.

Privilege log, we said we --

THE COURT: You're going to start this rolling process --

MR. RESTIVO: Yes.

THE COURT: -- in two weeks.

MR. RESTIVO: All right. Privilege log, we said we would provide them. He is entitled to them. We will do that.

THE COURT: When?

MR. BENTZ: It could be probably weeks to get that in the position where we have a good sense --

MR. RESTIVO: Again, Your Honor, you need to appreciate that there's two universes of documents. With respect to anything privileged from the document repository, I suspect he has that. We can produce that again because that repository and those privilege logs have been produced.

The new material we'll take from the 8,000 boxes, we will prepare a privilege log, but we haven't prepared it yet, and that will take a little bit more time.

MR. WESTBROOK: Your Honor, the old privilege log, we do have and don't need that. I was speaking about the privilege log for the documents they're intending to hold out as vermiculite.

THE COURT: All right. How long is the roll out on the CDs going to take? If you start in two weeks, how long is the process going to take?

MR. BENTZ: I would think, Your Honor, that with respect to the -- almost of the Zonolite attic insulation documents, that that could be wrapped up in a few weeks after we start. There is, I think a minority, maybe 20 percent of the documents that still have to -- may be subject to some further review or may take a little bit longer than that.

THE COURT: So you expect that between two and six weeks from now you will be producing everything, all the documents in the new CD?

MR. BENTZ: I think six weeks is a little bit aggressive, but I think it's a fair estimate.

MR. RESTIVO: They should certainly have 80 percent in six weeks. We're still looking at some of the 20 percent that we haven't looked at yet.

MR. BENTZ: That's correct.

THE COURT: All right. Hold on one second then. So, approximately 80 percent of the documents will be produced between two and six weeks from now. And the other 20 percent, two weeks after that?

MR. RESTIVO: Yes, Your Honor. And if we run into a problem with that two weeks, we'll tell Mr. Westbrook and if he has a problem, we'll come to the Court. But I think two is a fair estimate --

THE COURT: All right.

MR. RESTIVO: -- and we ought to be able to do it.

THE COURT: So, can the privilege logs be produced eight weeks from now when the final installment on the CDs is due?

MR. BENTZ: That would not be a problem.

THE COURT: Mr. Westbrook?

MR. WESTBROOK: Yes, Your Honor. What I'm hearing is we won't see the last of the documents until Thanksgiving. Then our fact discovery ends 30 days after.

THE COURT: Well, I understand that, and we may end up with this schedule and the debtor can't do any better, having to postpone it a little, I -- I really don't want to drag it on too long, but that may be what we have to do.

Why don't we address that issue at the status conference. Let me give you a date by which all of this production could be done because I want to address it on the

November 25th status conference. So, --

(Pause)

THE COURT: Is it possible to produce the privilege logs on a rolling basis as you're doing the CDs by box?

MR. RESTIVO: Well, I think, Your Honor, we could produce privilege logs on a rolling basis as we prepare them. I don't know they'll be on a box-by-box basis or subject-by-subject basis, but there's no reason we would not be in a position to produce the privilege logs. We don't have to wait until the end, and we can do that, I would think.

MR. BENTZ: I think that's correct. If there are technical issues and that's the reason I hesitate, it may be easier or harder, depending upon what the technical people tell me.

THE COURT: All right. Why don't I expect that the privilege logs will be produced on a rolling basis in that same two- to eight-week process. But everything, all the documents, the CDs, the privilege log, everything that I'm ordering to be produced has to be produced not later than Monday, November the 18th, that's a week before the November status conference. So, if that's not quite eight weeks from now, bump your schedule back and make it work. But everything is due not later than Monday, November 18th.

MR. RESTIVO: Next, Your Honor, you keep referring to and, to some extent, I keep referring to Zonolite attic

insulation. Mr. Westbrook carefully keeps referring to expanded vermiculite. The two things are different. What we're talking about at the science trial is Zonolite attic insulation. It's true that in some of the process before it goes into the bag, it gets expanded. But the use of the term expanded vermiculite is one carefully considered. What we're talking about is Z.A.I. The products are not the same, yes, there may be some similarities, but they are different products, they go through different processes. They are utilized differently.

And what the science trial deals with is not whether masonry fill inside a concrete block that may have been expanded at some point in its processing has anything to do with the presence of attic fill in a person's attic.

THE COURT: Well, what he's suggesting, though, is that to the extent that the test -- to the extent that at some point the expanded vermiculite is the same product that then gets shifted two different directions. That the tests that are done before that shift is made may show some fiber release. And to the extent that that fiber release is then relevant to the end product, it ought to be disclosed.

If there are different processes put in place from the point where that expanded product, you know, turns right or tuns left. At that point, turning left is irrelevant to Z.A.I. if it turns right. But as to the point at which they are all

the same, before that split is made, if there are tests that show a relief, it may have some relevance to the experts who are going to be looking at the end product. I think that's what Mr. Westbrook suggested.

MR. RESTIVO: And I guess our response to that, Your Honor, and our objection to what he's saying is if there, in fact, was finished product and he is correct that some of it goes into a bag called Z.A.I. and some of the same product goes into a bag called masonry fill, and prior to going into the two separate bags there was a test on that product, yes, we would give him that. I don't think that's what the import of what he's saying is. I think he wants to go back in time on other products.

But we will commit that if that situation, in fact, existed, which we don't believe existed, yes, we would give him the testing even though half the product went into a bag different than Z.A.I. because it would be the same product.

To the extent that happened, I don't believe it did happen, we'll give him testing on that.

THE COURT: All right. You'll get that test, Mr. Westbrook. Is that -- so, if it's the same product regardless of how it's bag, you're going to get the test.

MR. WESTBROOK: Thank you.

THE COURT: That's what you're asking for.

MR. WESTBROOK: That's what I was asking for.

THE COURT: All right.

MR. RESTIVO: Lastly, Your Honor, with respect to documentation in Maryland Casualty coverage litigation, again, the issue here is what does science say about Z.A.I. Any pleadings or other argument there doesn't answer the scientific question.

We have said in our answers to interrogatories if some document you have requested also happened to be produced in the Maryland Casualty, we're going to give it to you because you requested it here, not because it was produced in Maryland Casualty. By the same token, while there may be a protective order in Maryland Casualty, to the extent a Grace corporate document is relevant just because it was protected over there doesn't mean we shouldn't give it to Mr. Westbrook here and we're going to do that.

What we do object to is producing the pleadings and whatever else went on in that case that my firm wasn't involved with because it has no relevance to the question of the science phase Z.A.I. in someone's attic is creating a hazard.

THE COURT: Well, I don't know whether it does or not. Because to the extent that there were tests done on Z.A.I.'s products that were somehow or other disclosed in that case or to the extent that the debtor had witnesses testify or affidavits to explain those products, that may very well lead to admissible evidence in this case.

MR. RESTIVO: Again --

THE COURT: Now, to the extent that there was no such similarity, it won't.

MR. RESTIVO: Well, Your Honor, again to the extent there are documents that exist on Z.A.I. testing, we've already said we're going to produce that to Mr. Westbrook and we wouldn't withhold the production because it was also something produced in Maryland Casualty. I will ask the debtor or ask the debtor to ask coverage counsel if in that litigation there was testing created for the litigation or testimony or expertise on testing of Z.A.I. If there were, I'm sure we're producing it otherwise, but we'll be happy to check to make sure. And if that requires, I can't see how it would, someone to ask the Court to lift the seal, we would take the laboring oar to do that. But the idea of lifting the seal and then everything that happened in complicated coverage litigation has some relevance to this case, that we object to.

THE COURT: How is coverage litigation over? Is it over based on attic insulation? Is it over the mine? What was it about?

MR. RESTIVO: Your Honor, the most I can tell you, because we weren't involved, certainly back in the days of litigation against asbestos companies such as W.R. Grace, the two Gypsums, a few others, dealing with fireproofing material and dealing with acoustical plaster, I do know that some of

those companies, including Grace, had to litigate with their insurance carriers over responsibility for those property damage lawsuits. I simply don't know, I doubt, but I don't know that attic insulation was a subject matter that I don't believe attic insulation shows up on anyone's radar screen until the Barbanti and similar cases are filed about one year prior to the Grace bankruptcy. But I will ask and find out.

But my sense is if it's like all the other property damage insurance coverage litigation, what it dealt with was fireproofing, maybe pipe insulation. Grace didn't have that. Or acoustical products.

THE COURT: All right. If it's in no way involved attic insulation, frankly I don't see how it's relevant. If it does, however, I think it needs to be produced.

MR. RESTIVO: We will find out and I will send a letter to Mr. Westbrook as to what we found out and then he can take it from there and come back to the Court if he thinks there's some relevance and we disagree with him.

THE COURT: All right, Mr. Westbrook?

MR. WESTBROOK: Yes, Your Honor, that's fine.

THE COURT: All right.

MR. RESTIVO: I think that covered his list of items, I think.

MR. WESTBROOK: I think it did, Your Honor. I'm waiting the computer index to see what we have.

THE COURT: I want to check one --

(Pause)

THE COURT: Okay. The computer indices, did I give you a date for --

MR. RESTIVO: Yes, we said that we would -- Reed Smith would produce the non-privileged material indices or index or road map into the categories within three weeks, I thought.

THE COURT: Yes. Okay. Will the debtor be producing an order that will memorialize this record?

MR. RESTIVO: Yes, Your Honor.

THE COURT: Is that necessary or you just simply want the record to stand for what the record is?

MR. WESTBROOK: We can go by the transcript, Your Honor.

THE COURT: All right.

MR. RESTIVO: So can we, Your Honor.

THE COURT: All right, that's fine. And I'll simply state that these are all findings and agreements. And no written order will follow.

Do you need this calendared again of some reason, Mr. Westbrook? Or if you need something else, will you simply let me know what? Because I'm concerned that if I just continue this, it's going to be so confusing that you will have gotten stuff in the meantime and it may be better just to do it again.

MR. WESTBROOK: Your Honor, I'm confident we can work with Mr. Restivo, we're going to try our best to work this out and not be here every month with some kind of a dispute. I hope I don't have to eat my words on that, but I'm hopeful we can try to work these things out.

THE COURT: All right. So, no further order or hearing is necessary on existing Agenda Item Number 50. If you need something else, you'll let me know?

MR. WESTBROOK: Yes, Your Honor.

THE COURT: Okay. Thank you.

MR. RESTIVO: Thank you, Your Honor.

MS. BAER: Your Honor, that concludes what's on the agenda, but there are a few outstanding matters. The most significant of which is the infamous July 22nd order on Z.A.I. scheduling.

THE COURT: Yes. And this one is my fault and I apologize for this but I have gotten the transcript, I've looked at all the orders that have been submitted, I've had my law clerk draft our own, and I haven't entered it yet because I haven't had the chance to double-check since she has redrafted this order.

Have you come to any conclusion about what this order should say? We simply could not find what I had signed in court and I'm trying to recreate what I had signed in the court with the addition, of course, of permitting anybody who wants

to raise issue to do so.

MS. BAER: Your Honor, I thought it was pretty clear having been here on July 22nd that you had entered the debtors' version of the order. And it seemed to me there are only two real issues, one of which didn't come up that day and one which did, and that is how do you define the science trial.

And Mr. Westbrook's now given you, I think, three different ways to define it. The debtors consistent said the same thing over and over, which is, you know, what does science demonstrate regarding the health risks of exposure to Z.A.I.

Mr. Westbrook keeps trying to put property damage in there and we all understand these are property damage claims, not personal injury claims. But Z.A.I. doesn't harm property. The potential exposure of potential dangerous fibers could harm people and, therefore, cause a property damage, cause a hazard in their home that has to be dealt with.

The definitions Mr. Westbrook uses just simply don't make any sense. We know these are property damage claims. But the question is does Z.A.I. pose an unreasonable risk of harm in someone's attic. And I think that's what we've said in our order.

The other issue that Mr. Westbrook raised, which he did not raise in July, was is this confined to the ten claimants you have before you or is it expanded beyond that. And, again, I think the order that we submitted was clear. It

simply said the claims litigation was defined to the ten claimants. So, we know who we're deciding for. It doesn't --

THE COURT: Yes, that one I addressed early because I gave everybody a chance to join. I don't want people joining at the end of discovery and saying, oh, gee, I haven't had a chance to participate.

So, as far as I'm concerned, at this point, we're going forward with the ten named people. Their discovery is only getting off the ground. If somebody filed a motion and asked to join it, now I'd probably grant it. But next month, I won't.

So, you know, there's a timing issue here. And if somebody else wants in, they'd better get in now. I'm not going to continue the trial based on the fact that somebody decides at the last minute that they want in. I've given as much notice as I can. Judge Wolin said I did what was appropriate, he didn't see any need for me to do any more. So, I think I've covered the basics.

MS. BAER: Your Honor, I think those were the two issues that were raised, and I guess we'll look forward to getting the Court's version of the order then.

THE COURT: Okay. Mr. Westbrook?

MR. WESTBROOK: Your Honor, my only point is when we went back and look at this -- at the transcript of August 26th at page 62 after we had this colloquy again, the Court said at

Line 22, "Well, hopefully I did it myself within the context of the hearing. If I didn't," talking about the issues, "then I'll take a look at that. I was trying very hard not to set the parameter for what the issues would be until the discovery is done. I think the appropriate place to look at that is at the pretrial conference."

THE COURT: Right. And I still agree with that.

MR. WESTBROOK: Yes, Your Honor. And so when we submitted our latest proposed order, we tried to be entirely innocuous and neutral and said discovery, which we're talking about now, for the science trial shall be limited to the issues of what science demonstrates regarding Z.A.I. in the property damage context. That was as neutral and innocuous as I could think to phrase it.

MS. BAER: And, Your Honor, it doesn't make any sense.

THE COURT: Well, you have to have an issue. I mean you have to have an issue about harm. It's not what science demonstrates, the question is whether it poses an unreasonable risk of harm because -- I mean science may demonstrate a lot of things about Z.A.I., none of which may lead to claim in this case. And what I'm trying to get to is what are the claims against this estate and who has them and how do we notify those folks. That's what I'm attempting to accomplish and that's why we're taking this science trial first so that we can craft an

appropriate notice if there is some likelihood that an entity or a person may have a claim against the estate.

So, I have to have an area in dispute. It's not just the demonstration. And the question is what's the risk of harm that's posed. And I think the question is whether it's unreasonable because I guess life in general poses its own risks of harm, but that doesn't give you claim. So, I need to define the claim somehow.

MR. WESTBROOK: And, Your Honor, my concern has been -- and, of course, as Your Honor knows, I got into this a little late after this had been discussed. But my concern has been, from my experience in this litigation, that when we get down to defining the issues for trial, that I not be foreclosed from presenting to the Court our position on how a property damage claims should be proven up, that's my only concern.

THE COURT: Oh, no. In fact, that's -- I mean -- in terms of proving up the property damage claim, I don't know that this is the time for proving the claim. The question is whether or not there is going to be a claim because science would show that, in fact, somebody out there may have a claim. Then how you prove it at a later stage may be a different issue. But the answer is no, you're not foreclosed from trying to prove your claim however you want to prove your claim.

But in terms of defining the issue, I think -- I'd like to try to come to some consensus. I do need an issue.

MR. WESTBROOK: Your Honor, as neutral as we could probably make it, since we're in the property damage context, we're trying to find out what science will tell us about Z.A.I. in that context.

And, again, I come back to the fact that Grace continues to try to push the case to a quasi personal injury claim. And in our view, most respectfully, Your Honor, that's not what the case is about in the property damage context. I've tried for 20 years property damage cases and the issue is the building, is the building contaminated. Contaminated, yes, with a hazardous material. But we don't have to show in our view that there's going to be some percentage of people getting sick from it, that there's some particular emergency hazard to evacuate the building. That's why I've been somewhat persistent and hopefully not nauseating about this, Your Honor, that we not get foreclosed at the outset from proving and from getting to the pretrial conference to present the issues as we want them presented.

THE COURT: Well, I think you both are probably correct. Number one, yes, you're going to have to show me that there is some hazardous contamination. Now, what makes it hazardous? The fact is that it's going to either be hazardous to the environment or to the people who live in the home or something. There has to be a hazard. If there is no hazard, there is no claim.

And as I understood what has taken place, not by way of evidence, just by discussion here, the contention is that attic insulation is hazardous because if it's disturbed, people breathe it, and when they breathe it, there is a likelihood that they could ingest an asbestos fiber which could cause a disease. Not that it's hazardous just because it's sitting in an attic, but because somebody is going to be eventually injured by virtue of the fact that it's in their home.

So, the contamination may have to be remediated somehow in order to eliminate that hazard. But you have to, I think, show me that there is a way that there is going to be asbestos fibers that are somehow going to pose a hazard to somebody or else it's not going to be hazard. Right?

MR. WESTBROOK: I hear what you're saying, Your Honor. I think we will be able to show that asbestos fibers are certainly hazardous.

My suggestion, Your Honor, is you say we reach a consensus on this. We're moving ahead with discovery. I don't think the debate over the phrasing of this paragraph is holding up the discovery. So, we have our position reserved, Grace has its position reserved. The Court's language will be the Court's language. It won't stop us from moving ahead obviously.

MS. BAER: Your Honor, I agree. And I think you've heard more than enough on this one and we look forward to

receiving your order.

THE COURT: All right. Okay. I have -- I'm sorry. Were you finished?

MS. BAER: There was one other housekeeping matter, Your Honor. On July 22nd, at matter arose related to an action filed by English and American Insurance Company for some discovery. Your Honor decided that because there was an action going forward in England, you would deny their motion without prejudice and let the English courts do what they can do.

We submitted a certification of counsel on August 6th when it was brought to my attention by English and American's lawyers that the order was actually never entered.

THE COURT: I'm not getting your certifications of counsel, that's part of the problem. And I'm not sure why. Are they being e-mailed to Ms. Bello so that we know to check them? Because I have not -- I haven't seen that one even today and I thought I was up to speed --

MS. BAER: Your Honor --

THE COURT: -- today with what hasn't been entered.

MS. BAER: I know that it was filed in the e-mail system and it appeared on the Court's docket that way. That's how we know it's been filed, we get the e-mail notification from the Court. I don't quite know what happens next. I mean I do have more copies with me, it's Docket Number 2500 on the docket.

THE COURT: Could I see it, please?

MS. BAER: If I can approach?

THE COURT: Yes.

FEMALE SPEAKER: Judge, may I interrupt? Once you -- though you get e-mail notification once you file a docket, you still have to attach it to a separate e-mail directed to Rachel Bello by name. The fact that it gets filed does not send it to Rachel.

THE COURT: Some things are getting docketed that we're not finding out about even though we do a docket search. I mean that's what's confusing me. I'm not sure why we're not finding things on the docket, but I also know that I'm -- the double-check is that if they're e-mailed to Rachel, then she notifies us and we pull it. So, she's apparently not getting it either and that's why I'm confused about why I'm missing so many orders.

FEMALE SPEAKER: Send an e-mail to Rachel. Docketing it does not go to Rachel.

MS. BAER: Your Honor, we'll work with Delaware counsel to make sure we can fix this so that it doesn't keep happening.

THE COURT: Okay. Yes, I have not seen this order so I'm certain I haven't entered it.

MS. BAER: And this is by agreement, Your Honor. EAIC's counsel saw it and we agreed on the language.

THE COURT: All right. Well, I'm changing the date to be today, September 23rd, and I am signing it now so I'll make a note.

Ms. Baer, check the docket in about two days. If this hasn't been docketed, call my office in Pittsburgh and let me know so that I can double-check. I really am a little concerned about what happened the last time where an order is missing and I don't want this to get missing.

MS. BAER: Your Honor, I wonder if it would make sense before we leave to get a Xerox copy of your signed one so that --

THE COURT: Sure. Do you have another one? I'll sign another.

MS. BAER: I do. I do.

THE COURT: I'll give you one.

(Pause)

THE COURT: Here you are.

MS. BAER: Thank you. Your Honor, that concludes all the items on my agenda, plus the few things in addition.

THE COURT: Okay. I have a couple -- does anybody else, before I start on my list, have any additional housekeeping matters to address.

(No audible response heard)

THE COURT: Okay. Give me one second. I have a note to myself about one that I want to cover first.

(Pause)

THE COURT: Oh, yes. Okay. First of all, I am still occasionally not getting full captions on documents. In fact, I have an example of one here that Mr. Tacconelli brought over. This is another order I haven't seen, so I don't -- I have to check back to my July proceeding memo before I know whether this is what I wanted ordered. But it has no docket number reference, it has no agenda order reference. It's an order that deals with the motion of the asbestos property damage claimants for a clarification of the counsel of record issue that we talked about in court.

Now, I, of course, recall talking about it. But whether this meets what I said I was going to do by way of an order, I don't know. And there is absolutely no reference on this proposed order that would clue me in to where I should be searching for this. There is a caption, it does say order addressing, et cetera, et cetera, but it doesn't have a docket number reference and I've been insistent that I'm not going to deal with these things unless I get all these pieces. It's simply too complicated to do.

MR. TACCONELLI: Your Honor, Theodore Tacconelli for the Property Damage Committee.

Your Honor, I apologize. We will put a docket reference on that to the motion. It was filed under a certification of counsel that had it. It was attached to that,

but the order does not have it.

THE COURT: See, now I didn't get that certification either. So, apparently -- maybe the problem is the certification of counsel. Because it's happening in one of the other asbestos cases here, too, where I'm missing certifications. So, maybe that's the problem. I'll have to double-check and see. But I haven't seen that either, Mr. Tacconelli. So, I'll search for it.

MR. TACCONELLI: Your Honor, we will revise that order to reference --

THE COURT: It's fine, I have it, I've got the proceeding memo, I'm going to take care of it as soon as court's done today. So, I don't need another copy, I don't want to further confuse things. But in the future, please put a docket number reference.

MR. TACCONELLI: Your Honor, while I'm up here, there's also another order that we've been waiting to have entered, that's the order approving the retention of Hillsoft (phonetic) notifications.

THE COURT: Now, that one I have to go back to, too. Because that hearing was months ago and I thought we had a discussion on the record, but I haven't checked my notes and I'm not sure my memory is that good, but I thought we had a discussion about the fact that I was concerned about duplication of services. And I thought that I was denying the

request. Your proposed order says that I simply said that I'd make sure that I was going to review the fee for no duplication of services.

MR. TACCONELLI: You may be confusing that with some other processionals employed by our Committee, Your Honor.

THE COURT: Okay.

MR. TACCONELLI: I don't think there ever was a discussion about Hillsoft.

THE COURT: Okay. Then I'll check back through my notes. And, again, I didn't get that certification of counsel either, Mr. Tacconelli, but I do have that order and after court I will check the proceeding memo about that one, as well. But, again, please put a docket number reference for me.

MR. TACCONELLI: Very well, Your Honor.

THE COURT: Okay.

MS. BAER: Were there other items, Your Honor?

THE COURT: Oh, yes. I haven't seen a business plan yet in this case. And I have extended exclusivity until February, but I'm looking for some sort of a business plan that tells me what the debtor is planning to do, not by way of a reorganization plan.

I've approved the compensation for key professionals. I still haven't seen a business plan. When am I going to get to see a business plan?

MS. BAER: Your Honor, I could certainly talk with my

clients about it right -- it isn't something we routinely do for a Bankruptcy Court, so I'm sure it hasn't been teed up as one of those to do things we have to do.

In terms of the business plan, Your Honor, a little clarification on exactly what you're looking for.

THE COURT: Well, I thought Ms. Bernick (phonetic) indicated that this debtor is essentially on a rolling basis where it's analyzing its core businesses, looking at its employee compensation and doing the other things that you tend to do when you're running a business. I'd like to see what the debtors plan is for the next couple of years and how it intends to carry on its core operations or if it's ridding any. I simply don't know what the debtors' expectation is. It appears that this case is going to be around for a while until you get through the litigation. I'd like to see whether there's a chance that it's actually going to have a fundamental business operation to reorganize.

And the case is now old enough that by now, I would think the debtor and the various constituents are probably talking about that issue. So, I'd like to see what the debtors' expectation is. I don't necessarily expect that it's going to be shared among the Committee. I certainly don't want it filed on the public record, I'm not trying to cause the debtor anti competitive problems by any means, but I want to know what the debtors' expectation is for its business over the

next couple of years.

MS. BAER: Your Honor, I'm sure that the debtor internally prepares those all the time and we'll speak with them about what there is and what is appropriate to submit and how to do so.

THE COURT: Okay. Can you just put that on the agenda for the next hearing so that as a status conference matter, if you haven't filed something in the meantime.

MS. BAER: And, Your Honor, when you say file something, what you really would propose is to submit something to Your Honor.

THE COURT: Yeah, either in chambers or under seal. I don't -- however you choose to do it. But I would like to see -- the monthly financial reports, the operating reports in these cases are Greek. I want to see what the debtor is really doing, and a nice simple profit and loss statement and balance sheet, for example, would go a long way towards helping. And I know the debtor does them because --

MS. BAER: It has to.

THE COURT: -- you've got all your filings that you've got to --

MS. BAER: Right.

THE COURT: Right. So, if I could even get something like that with a -- maybe a projection for what the debtor expects the business to do differently in the next year or so,

that would be fine. But I'd like some basic information, not the mountains of documents because I don't have either the time or the inclination to have to search through them regularly.

MS. BAER: We'll do so, Your Honor.

THE COURT: Okay. The other thing is pick the dates for next year so that you can get the notices out with respect to hearings. So, if you'll let me catch up my notes one second and then we'll turn to that.

(Pause)

THE COURT: Okay. Does Grace have any Board meetings on Monday at all next year?

MS. BAER: No.

THE COURT: No. Okay. These are the dates that I'm going to be here. January 27th, February 24th, March 17th, April 28th, May 19th, I'll be here the week of June 16. My expectation is that that week we will probably do Grace hearings on Tuesday afternoon, June 17th, unless that causes a problem for you.

MS. BAER: Not that we're aware of.

THE COURT: No, all right. Then let's say that one will be Tuesday the 17th at noon, rather than Monday.

July 28th, August 25, September 22, October 22, November 17.

Then my Delaware date for December will be December 15th, but I believe I'm going to be doing those hearings in

Pittsburgh that day. So, we'll have to discuss whether you want to come there or try to do them by phone or what, but I think I'm going to have a conflict such that I can't come here that day and I may have to do them in Pittsburgh. So, at the moment, I'm planning to have Grace in Pittsburgh on December 15.

MS. BAER: That's fine, Your Honor.

THE COURT: Okay. Anybody need them repeated?

MS. BAER: No, Your Honor. And as I understand, those will all be at noon?

THE COURT: That's what I'd like to do. Now, I'd like to put this issue back on the calendar for next month unless you have to do notices in the meantime. Because I want to talk to the Kaiser and Owens folks and I just got another asbestos case that's going to take some omnibus dates and I'm trying to sort of put together like a jigsaw puzzle somehow and figure out which cases fit best in what time slots.

This has been taking about two hours. Is that your expectation for how long we're going to continue? Or will there be periods where it's going to be a lot longer, or do you know?

MS. BAER: Your Honor, I haven't seen anything that would suggest it's going to be any different. In fact, I know that, for example, this coming October, right now there's not much on the agenda, so that may even be shorter.

November sounds like it could be a long one because we have potential -- several fee things, Z.A.I. coming up again. But there's nothing extraordinary that would suggest it would be any different.

THE COURT: Okay. If that's the case, I think noon would work pretty well for my schedule, if that doesn't cause a problem for you. So, let's plan that.

How far in advance are you noticing hearing dates?

MS. BAER: Your Honor, we sent out your schedule back -- I think last February for the whole year, which was very helpful because we also keyed into there when people have to file motions and --

THE COURT: Yes.

MS. BAER: -- objections. So, I would anticipate we could do the same thing here again, send out a whole schedule for the year soon that gives people that planning.

THE COURT: Are any of you going to be here tomorrow for the Owens hearing? Because I have Kaiser later today and Owens tomorrow, and by the time I get through Kaiser and Owens, I could confirm the time.

MS. BAER: No, Your Honor, we're not going to be here. But if Ms. Bello would contact our Delaware counsel, we could then adjust and get out a schedule, or we can get out a schedule after the October hearing.

THE COURT: Okay. I wondered whether that was going

to give you sufficient time for people who might have to file motions for January.

MS. BAER: For January, I have -- I think we're still okay, but it's starting to get tight.

THE COURT: Okay.

MR. HURFORD: Your Honor, either myself or someone from my office will be here.

MS. SCARUZZI: Identify yourself.

MR. HURFORD: I'm sorry. Mark Hurford of Campbell and Levine. Either myself or someone else from my office will be here tomorrow at Owens Corning.

THE COURT: Oh, okay. So, then we could, through the Asbestos Committee, get the word out to the debtor about the time at that point, and I can also ask Ms. Bello to confirm it, as well.

Okay. Is there any conflict if this doesn't work? If my grand scheme fails, is there any conflict in terms of starting either earlier or later on the dates that I've just given you?

MS. BAER: Your Honor, I don't think later is too much of a problem. Earlier may be a problem because I know, for example, that the trade committee people sometimes come up first thing in the morning. We usually come in the night before, usually there's a lot to do before the hearing.

MS. KRIEGER: Your Honor, if we take the eight

o'clock train in, we're here for the ten o'clock hearing. Arlene Krieger from Stroock and Stroock and Lavan.

THE COURT: Okay. All right. I'll keep that in mind when I'm doing this. As I said, at the moment, I'm expecting that noon will work, but I really just don't know until I talk with the other folks and I'd like to try to make it as convenient as possible for everybody who has to get here.

MS. BAER: I think just, Your Honor, at the end of the day, the last flight out may be seven P.M., so that's -- if we don't start until four o'clock, we might have a problem.

THE COURT: Well, I think that the last ones I'm going to try to start will be at three because I have that same problem of getting out, too. And as a result, I don't like to try to schedule something that's going to last longer. Most of the time, though, when I start at three, we're done five-ish. Occasionally it runs over, and sometimes it's very late and it's -- I can't really predict that. I probably have to rely on you to let me know that there is going to be a problem on a given day so that maybe we can let everybody else know either the flights have to be changed or, you know, that something is likely not to go as normal on that day.

MS. BAER: I would say if there was a preference, Your Honor, earlier versus later is probably better for all of us.

THE COURT: All right.

MS. BAER: We do tend to come in the night before anyway.

THE COURT: Okay. Well, earlier probably will be 8:30. That's probably -- I'll check.

MS. BAER: Okay. From the debtors' perspective, that's fine.

MS. KRIEGER: Again, I'm going to be spending a lot of time in Delaware.

UNIDENTIFIED ATTORNEY: Your Honor, that six o'clock flight from Pittsburgh is just tremendous.

(Laughter)

MR. RESTIVO: You can't make that six o'clock flight and be here at 8:30, I've tried it. They cancel it too often, Mr. Restivo.

THE COURT: Yes?

MR. WESTBROOK: Your Honor, I was just going to say those of us from south of the Mason Dixon Line would appreciate that noon hearing, we wouldn't have to spend the night, save us a couple of dollars.

THE COURT: Yeah, see that's -- I think that's going to be the problem with everyone in the cases, that's the issue that I'm facing. And the ten o'clock hearings have worked pretty well with only three of you. But now that I've got a fourth case that I'm trying to stick in, I think it's not. I just have to juggle it a little better and I think I have to --

so, somebody's going to suffer, it's early in the day and somebody's going to suffer later in the day, and I was trying to give you the accommodations since you were first in -- so, okay, I'll let you know tomorrow for sure. But it will probably be noon.

Anything else that we need -- anybody needs to address?

(No audible response heard)

THE COURT: Okay. Thank you, we're adjourned.

MULTIPLE SPEAKERS: Thank you, Your Honor.

(CONCLUSION 12:21 P.M.)

C E R T I F I C A T I O N

I, Karen Hartmann, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

Date: September 28, 2002

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